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No. 88-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATHAN N. POWELL,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether Petitioner's disbarment for having a client post a $10,000 certificate of deposit as collateral for a loan to a judge violated the due process or equal protection clauses of the fourteenth amendmant to the United States Constitution.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii, iv
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2-5
INTRODUCTION	5
SUMMARY OF ARGUMENT	5-6
ARGUMENT	7-22
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). 7

In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988) . . . . passim

In re Daley, 549 F.2d 469 (7th Cir. 1977) 20

In re D'Angelo, 126 Ill.2d 45, 533 N.E.2d 861 (1988) 18

In re Green, No. 65942, slip op. (Ill. Oct. 20, 1988) 18

In re Heller, 126 Ill.2d 94, 533 N.E.2d 824 (1988) 17

In re Jones, 125 Ill.2d 371, 532 N.E.2d 239 (1988) 16

In re Karzov, 126 Ill.2d 33, 533 N.E.2d 856 (1988) 17

In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988) 17

In re Lane, 127 Ill.2d 90, 535 N.E.2d 866 (1989) 18

In re Leonard, 64 Ill.2d 398, 356 N.E.2d 62 (1976) 21

In re Lidov, No. 67978, slip op. (Ill. May 17, 1989) 18

In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). . . . 7, 19

In re O'Hallaren, 64 Ill.2d 426,
356 N.E.2d 520 (1976) 21

In re Powell, 126 Ill.2d 15,
533 N.E.2d 831 (1988) . . . . passim

In re Rothenberg, 127 Ill.2d 139,
535 N.E.2d 849 (1988) 17-18

In re Ruffalo,
390 U.S. 544 (1968) . . . . . passim

In re Saladino, 71 Ill.2d 263,
375 N.E.2d 102 (1978) 8

In re Samuels, 126 Ill.2d 509,
535 N.E.2d 808 (1989) 14

Middlesex County Ethics Committee,
et al., v. Garden State Bar
Association, 457 U.S. 423 (1982) . . 20

People v. Tosch, 114 Ill.2d 474,
501 N.E.2d 1253 (1986) 11

Pulley v. Harris,
465 U.S. 37 (1984) 19

CONSTITUTION:

U.S. CONST. amend XIV . . . . . passim

STATUTES:

107 Ill.2d Rule 1-102 8

107 Ill.2d Rule 7-110 . . . . . passim

107 Ill.2d Rule 65(c)(4) 3-4

107 Ill.2d Rule 771 . . . . 4-5, 21-22

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution
Amendment XIV, Section 1:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

Illinois Code of Professional Responsibility, Rule 7-110(a). Relationship With Officials (1980).

A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Illinois Code of Professional Responsibility, Rule 7-110(a). Relationship With Officials (Amended 1988).

A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(c)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Illinois Code of Judicial Conduct, Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its

regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Supreme Court Rule 771. Types of Discipline

Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline of attorneys may be:

(a) disbarment;
(b) disbarment on consent;
(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of

the court with probation; or

(g) censure.

INTRODUCTION

For the sake of brevity, Respondent will not include provisions in this brief for the opinion below, jurisdiction, and statement of the case. Respondent will address in the argument section those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, in disciplining Petitioner, the Supreme Court of Illinois did not violate the equal protection clause. Even if the Court had adopted Petitioner's proposed interpretation of Rule 7-110(a) of the Illinois Code of Professional Responsibility, such an interpretation would not have affected the result the state court reached in Petitioner's disciplinary proceeding.

Second, Petitioner was not denied due process of law during the

course of the disciplinary proceeding against him. Petitioner received notice of the charge and an opportunity to defend in complete conformance with due process requirements mandated by In re Ruffalo, 390 U.S. 544 (1968).

Third, the amount of discipline imposed upon Petitioner is within the discretion of the Supreme Court of Illinois. Such flexibility is crucial to achieve the ultimate goals of the disciplinary system. The only issue in fact raised by this petition is an issue of state law, which the Supreme Court of Illinois has already decided.

ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied because Petitioner was accorded due process and equal protection of the laws during his disbarment proceeding. Lawyer discipline is within the inherent authority of the state courts. See, Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-793 (1975). Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of Illinois. See, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282, 1284 (1980).

Petitioner was disbarred for having a client post a $10,000 certificate of deposit as

collateral for a loan to a judge before whom Petitioner and the client had a pending case. The Supreme Court of Illinois found that Petitioner circumvented a disciplinary rule through the actions of another in violation of Rule 1-102(a)(2); gave or lent a thing of value to a judge in violation of Rule 7-110(a); and engaged in conduct prejudicial to the administration of justice in violation of Rule 1-102(a)(5).

In selecting the amount of discipline to be imposed upon an attorney the Supreme Court of Illinois balances the need to be consistent with a consideration of the unique facts of the particular case. See, In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978).

Based on the unique facts of this case, including the specific finding that Petitioner intended to curry favor with the judge, the deliberate nature of Petitioner's course of conduct, and Petitioner's involvement of his own client in an unethical scheme, the Supreme Court of Illinois concluded that disbarment was the appropriate sanction.

Petitioner argues that his disbarment violates the equal protection clause because Rule 7-110(a) prohibits gifts or loans to judges yet allows contributions to campaign funds. Petitioner argues that this classification is irrational and can only be cured by interpreting the rule in such a way as to take into account the mental

state or purpose accompanying a gift or a loan to a judge.

The Supreme Court of Illinois correctly concluded that such an interpretation would not affect the result in Petitioner's case. The court adopted the Hearing Board's finding that Petitioner was attempting to curry favor with the judge. Petitioner testified that he arranged the loan, in part, because he feared that the failure to do so would adversely affect the case then pending before the judge.

The Supreme Court of Illinois held that Petitioner did not belong to the group which he contended Rule 7-110(a) discriminates against, namely those attorneys who make personal gifts to judges with no improper motive. The court

noted that in order to raise an equal protection argument, the party must be a member of the class against whom the rule allegedly discriminates. People v. Tosch, 114 Ill.2d 474, 482, 501 N.E.2d 1253, 1256 (1986), cert. denied, 483 U.S. 1008 (1987).

Because Petitioner's actions were calculated to have an effect on the case pending before the judge, the Supreme Court of Illinois correctly concluded that Petitioner lacked standing to raise his equal protection claim.

Petitioner also argues that his disbarment violates equal protection and due process because Petitioner arranged the loan for the judge before the Supreme Court of Illinois formally adopted Rule

7-110(a); because the meaning of Rule 7-110(a) was vague and debatable before the court decided In re Corboy, et al., 124 Ill.2d 29, 528 N.E.2d 694 (1988); and because Petitioner did not receive the same disciplinary sanction imposed upon other Illinois attorneys who violated Rule 7-110(a).[1]

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[1] It is to be noted that although Petitioner raised an equal protection claim before the Supreme Court of Illinois, he did not raise a due process claim.

Petitioner asserts that his disbarment violates due process because the meaning of Rule 7-110(a) was vague and debatable at the time Petitioner engaged in the misconduct. Petitioner's argument is meritless. In this case, Petitioner's actions were wrong under the prior disciplinary rule and wrong under the rule as later amended by the state court in In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988). The Supreme Court of Illinois correctly concluded that Petitioner violated Rule 7-110(a) under any analysis of the rule. In re Powell, 126 Ill.2d 15, 26, 31, 533 N.E.2d 831, 835, 837 (1988). Rule 7-110(a) provided Petitioner with more than fair warning that he could not engage in such activity.

Although Petitioner arranged the loan for the judge before the Supreme Court of Illinois formally adopted Rule 7-110(a), Petitioner concedes that prior to the adoption of the Code of Professional Responsibility, the court had in numerous opinions referred to the Illinois State Bar Association Ethics Code as a safe guide in reviewing lawyer conduct. (Petition at 5, n.4). See, In re Samuels, 126 Ill.2d 509, 524, 535 N.E.2d 808, 814 (1989). Petitioner, a lawyer of long standing, knew or should have known that loans to judges were unethical. The Supreme Court of Illinois noted that when the judge asked for his help Petitioner felt victimized because he could not

reconcile what he was doing with the fact that he had a case pending before the judge. At the judge's criminal trial for extortion Petitioner testified that he decided not to tell his co-counsel, Paul Flaherty, about the loan because he knew Flaherty to be a man of good character and he feared Flaherty would withdraw from the case if Flaherty learned of the loan to the judge. Powell, 126 Ill.2d at 23, 533 N.E.2d at 833.

Petitioner was accorded due process in the formal disciplinary proceeding. In In re Ruffalo, 390 U.S. 544 (1968), this Court stated due process requires that an attorney in a disciplinary proceeding receive notice of the charge and an opportunity to be

heard. Id. at 550. Both requirements were met in the instant case. Petitioner had notice that he was charged with arranging a proscribed loan to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner. Petitioner was represented by counsel at hearing and on appeal.

Petitioner's basic underlying grievance is that he did not receive the same disciplinary sanction as certain other Illinois attorneys who violated the same disciplinary rule. In In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988) and In re Jones, 125 Ill.2d 371, 532 N.E.2d 239 (1988), a total of seven lawyers were found to have violated amended Rule

7-110(a). The Court declined, however, to impose sanctions upon them due to the unique facts surrounding their financial transactions as well as other mitigating factors. In other cases considering Rule 7-110(a) the court suspended or disbarred Illinois attorneys for violations of Rule 7-110(a). See, e.g., In re Karzov, 126 Ill.2d 33, 533 N.E.2d 856 (1988) (eighteen month suspension), petition for cert. filed (No. 88-1740); In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1140 (1988)(two year) suspension); In re Heller, 126 Ill.2d 94, 533 N.E.2d 824 (1988)(disbarment); In re Rothenberg, 127 Ill.2d 139, 535

N.E.2d 849 (1989)(one year suspension); In re D'Angelo, 126 Ill.2d 45, 533 N.E.2d 861 (1988)(disbarment); In re Green, No. 65942, slip op. (Ill. Oct. 20, 1988)(disbarment)(opinion vacated after Green's death but prior to the issuance of the mandate); In re Lane, 127 Ill.2d 90, 535 N.E.2d 866 (1989)(one year suspension); In re Lidov, No. 67978, slip op. (Ill. May 17, 1989)(six month suspension).

The Illinois court was not required to make Petitioner's sanction identical with others who were found to have violated the same disciplinary rule. Final responsibility for determining discipline to be imposed on attorneys rests in the Supreme

Court of Illinois. In determining the appropriate penalty, the Court may properly consider all facts and circumstances in aggravation and mitigation, including the attorney's actual conduct. See, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). Furthermore, this Court has rejected the notion that there is a constitutional right of proportionality of sanctions, even in criminal proceedings. See, e.g., Pulley v. Harris, 465 U.S. 37 (1984). Even if it could be argued that a criminal defendant were entitled to this type of proportionality, the concept should not apply to an attorney disciplinary proceeding. A disciplinary proceeding is simply not criminal in nature. In re

Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1977). C.f., In re Ruffalo, 390 U.S. 544 (1968)(disciplinary proceedings, although sui generis, described as quasi-criminal).

Flexibility in imposing sanctions is neither arbitrary nor unconstitutional but necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice. See, Middlesex County Ethics Committee, et. al. v. Garden State Bar Association, et. al., 457 U.S. 423, 434-35 (1982). To achieve fair results, the disciplinary system must be neither rigid nor mechanistic, but flexible enough to

allow for the uniqueness of each case. See, In re Leonard, 64 Ill.2d 398, 406, 356 N.E.2d 62, 66 (1976). The court must evaluate each situation independently because the circumstances of each case vary substantially. Sanctions which are appropriate in one situation may be inappropriate in another even though the underlying offense is similar or even the same. See, In re O'Hallaren, 64 Ill.2d 426, 433, 356 N.E.2d 520, 523 (1976). The Illinois court correctly applied these principles in deciding the proper sanction for Petitioner.

Finally, Illinois Supreme Court Rule 771 provided Petitoner with sufficient notice that the state court had the authority to impose

discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. Thus the issue of appropriate sanction as raised by Petitioner is a matter of state law. No substantial federal questions exist.

In summary, the due process and equal protection clauses of the United States Constitution do not require a more exacting standard than that employed by the Supreme Court of Illinois. Further, disparate sentencing is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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